

IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 076 OF 2016

BETWEEN : NEMIA WAUCA

Appellant

AND : STATE

Respondent

Counsel : Ms. S. Hazelman for Appellant  
Ms. S. Kiran for Respondent

Date of Hearing : 11<sup>th</sup> April, 2017

Date of Ruling : 26<sup>th</sup> April, 2017

JUDGMENT

1. Appellant is charged in the Magistrates Court at Rakiraki with one count of Theft for allegedly stealing four yaqona plants valued at \$ 270.
2. Appellant has been in remanded since 11<sup>th</sup> October 2016. He applied for bail at the Magistrates Court. His bail application was refused by the learned Magistrate by his written Ruling dated 9<sup>th</sup> November, 2016 on the basis that

the Appellant had been charged with the present allegation whilst he was on bail in another two pending matters before the Magistrates Court at Rakiraki.

3. Appellant now appeals the Ruling of the learned Magistrate.
4. This Appeal is made pursuant to Section 31 of the Bail Act 2002. The Section 31 states:

*(1) All grants or refusals of bail and all orders, conditions or limitations made or imposed under this Act are appealable to the High Court upon the application either of the person granted or refused bail or of the Director of Public Prosecutions.*

*(2) The High Court may*

*(a) in its original jurisdiction grant or refuse bail upon such terms as it considers just;*

*(b) on an appeal under subsection (1), confirm, reverse or vary the decision appealed from*

*(3) This section is in addition to section 22(8) (as to the acceptance of sureties or security) and section 30 (as to review of bail decisions).*

5. The Respondent has filed submissions objecting to the appeal. At the hearing, both parties relied on written submissions filed.
6. Grounds of Appeal:
  - a) Learned Magistrate erred in law in failing to consider the presumption of innocence in his favour;

- b) Learned Magistrate failed to analyse the strength of prosecution case;
- c) Learned Magistrate erred in saying that there was no exceptional circumstance at paragraph 13 when such is only applied if more than one application is filed;
- d) Learned Magistrate erred in law in failing to make proper assessment on the balance of probability in relation to the public interest and the interest of accused person;
- e) Learned Magistrate erred in law in putting too much emphasis on the likelihood of committing arrestable offences whilst on bail;
- f) Learned Magistrate erred in law in failing to effectively canvas the Appellant's grounds for bail thereby encumbering the right of the Appellant to bail pending hearing;
- g) Learned Magistrate erred in law in putting too much emphasis on the two pending matters which the Appellant maintain a not guilty stance in reaching his decision.

7. The Bail Act 2002 provides for a presumption in favour of granting bail pending trial to an accused. The party opposing bail carries the onus to rebut the presumption on the balance of probability. Bail should be granted unless the Court is satisfied of any one or more of the considerations set out in Section 19(1). They are:

- (a) That the accused is unlikely to surrender to custody and appear in court.
- (b) The interest of the accused will not be served through granting bail.

- (c) Granting bail would endanger the public interest or make the protection of the community more difficult.

I consider all grounds of appeal together bearing in mind each ground separately

8. Appellant submits that the learned Magistrate erred in failing to consider the presumption of innocence in his favour.

9. Article 14 (2) of the Constitution states:

*Every person charged with an offence has the right —  
(a) to be presumed innocent until proven guilty according to law;*

Article 13 (1) of the Constitution states:

*Every person who is arrested or detained has the right- (h) to be released on reasonable terms and conditions, pending a charge or trial, unless the interests of justice otherwise require;*

Article 3(1) of the Bail Act 2002 states:

*Every accused person has a right to be released on bail unless it is not in the interest of justice that bail should be granted.*

10. It is clear that a detention of a person charged with an offence is not contrary to the notion of presumption of innocence if the court is satisfied that the detention is in the interest of justice.

11. The learned Magistrate at paragraph 4 states as follows:

*"I remind myself that in bail hearings, it is the duty of court to satisfy itself on the balance of probability that whether bail is granted or refused, it is in the interest of*

*justice to do so, pending the outcome of the substantive charge. In addition, bail hearings are not for the purpose of determining innocence or guilt of any suspect”.*

12. There can be no doubt that, at a bail hearing, a court is not supposed to determine innocence or guilt of an accused person. However, the law requires the court determining bail to be satisfied that a reasonable suspicion exists against the accused of having committed an offence.
13. Article 9(1) of the Constitution states: *A person must not be deprived of personal liberty except (e) if the person is reasonably suspected of having committed an offence.* Furthermore, Section 19 (2) of the Bail Act requires the court determining bail to consider the strength of the Prosecution case in forming the opinion that the accused person is unlikely to surrender to custody to stand trial.
14. In a context where the accused has pleaded not guilty to the charge, a magistrate in a bail matter, although not supposed to determine guilt or innocence, is required to direct his mind to evidence available against the accused. In his bail Ruling the learned Magistrate has not analyzed evidence against the Appellant for him to be satisfied that the suspicion against the accused is reasonable.
15. Furthermore, the learned Magistrate has taken into consideration two pending cases where the Appellant has pleaded not guilty to form the view that it is not in the interest of the public to grant bail because there is a real likelihood of him committing an arrestable offence if released on bail.
16. According to Section 19(2) C III of the Bail Act, in forming the opinion whether to grant bail, a court must have regard to the real likelihood of the accused person committing an arrestable offence while on bail. The object to be achieved is the protection of the community and public interest.

17. The question here is whether the learned Magistrate's finding that the Appellant is a potential threat to the protection of the community and public interest is justified in the circumstances of this case.
18. The learned Magistrate relied on the bail decisions in State v Tuilagi [2008] FJHC 317; HAC069.2008 (13 November 2008) State v Tuimouta Criminal Case No. HAC 078/2008 (18 August 2008) and Williams v State Criminal Misc. Case No. HAM 079/2008 (8 October 2008) Deo v State [2013] FJHC 71; Criminal Case 16.2013 (25 February 2013) where the Court held that when an accused is faced with a new allegation while on bail, the test is whether there is a likelihood of the accused committing a further arrestable offence on bail.
19. It was held in R v Crown Court at Harrow [2003] 1 WLR 2756, at 2778 that

*"the fact that new offences appear to have been committed whilst on bail is likely to be a factor of considerable importance against the defendant when deciding whether there is substantial grounds for believing that, if released, he would commit a further offence while on bail."*
20. It should be noted that factual scenario that led to the decisions cited by the learned Magistrate are materially different from what he was confronted with in the present case. In the present case, Appellant had no previous convictions whereas in the cases cited by the learned Magistrate, the accused or applicant had previous convictions.
21. In State v Tuilagi (supra) the 2<sup>nd</sup> accused was charged with Robbery with violence a serious offence which was punishable by maximum penalty of life imprisonment under the penal Code. The charge in that case arose while the 2<sup>nd</sup> Accused was serving a suspended sentence for theft. Accused person had

previous convictions. He allegedly committed the subsequent offence whilst serving a suspended sentence for theft. Shortly after he was granted bail in that case, a new allegation of similar nature, a charge of robbery with violence arose against him.

22. Gounder J observed:

*[14] The offence of robbery with violence is prevalent in our community. The public has legitimate concern for their safety and security because of the increase in this offence. I need not to be satisfied that the 2nd Accused is guilty of these offences before remanding him in custody pending trial. It is sufficient if I am satisfied that the interests of justice, which includes the public interests, outweighs the Accused's right to personal liberty in order to remand him.*

*[15] I am satisfied on balance of probability that there is a likelihood of the 2nd Accused committing a further arrestable offence while on bail and therefore it is in the public interests that he remains in remand pending trial.*

23. In Williams (supra), the Judge was concerned about the Applicant's history of breaching bail conditions. The State opposed bail saying the Applicant had a history of breaching bail conditions. In two matters, the Applicant was arrested on a bench warrant for failure to appear in the hearings in breach of his bail conditions. Further the Applicant had two previous convictions for escaping from lawful custody and two for robbery with violence.

24. In Tuilagi (supra), the applicant, before being charged in that case, had previous convictions. The 2nd Accused person had allegedly committed the offence whilst serving a suspended sentence for theft.

25. In *Deo v State* (supra) the bail decision of the Magistrate was upheld by the High Court. The applicant had applied for bail in the Magistrates Court but his application was refused by the learned Magistrate. The learned Magistrate gave the following written reasons for refusing bail to the applicant:

*"In this case, whilst I find that the accused was not on bail but serving a sentence extra-murally when he was charged with this new offence, the bringing of this most serious charge, allegedly committed whilst serving an extra mural sentence inevitably points to a real likelihood that the accused could re-offend if granted bail. I do not have to be satisfied of his guilt beyond a reasonable doubt, and it is sufficient if I am satisfied on the balance of probabilities that he is likely to re-offend whilst on bail. I am satisfied on the balance of probabilities that the accused is likely to commit an arrestable offence if granted bail, and bail is refused accordingly."*

26. It is clear that the magistrate's finding in *Deo* (supra) was not questionable as it was based on a previous conviction of the accused. The new charge against him arose while he was an extra-mural prisoner.
27. In *R v Crown Court at Harrow* (supra), the claimant had a previous conviction for rape, and for that offence and another offence of violence he had served 14 years' imprisonment, so in accordance with section 25 of the Criminal Justice and Public Order Act 1994, as amended, the judge could only grant bail if he was satisfied that there were "exceptional circumstances" which justified that course. He was not so satisfied, and bail was refused.
28. In the present case, the learned Magistrate's finding is questionable in that he took into consideration mere allegations pending against the Appellant to form the opinion that the Appellant would be a potential threat to the



protection of the community and public interest. He merely took judicial notice of the fact that the Appellant had two pending cases. He had not taken trouble to examine the nature of pending charges and evidential substance on which those charges were based.

29. The pending charges against the Appellant are mere allegations. It may be true that the charges are not generally brought without an evidential foundation. Still, the Appellant is presumed innocent until the charges against him are proved. Presumption of innocence is inalienable right entrenched in our Constitution. Therefore, the judicial officer hearing a bail application should direct his mind to the presumption in favour of the Accused of innocence in balancing his rights with that of the community.
30. In R v Phillips 32 CAR 47 (a South African case) a 23-year-old accused had a bad record and it was accepted while on bail he committed nine similar offences. The Court consisting of Goddard LCJ, Atkinson and Cassels JJA had this to say:

*"The Court feels very strongly that the applicant ought to have been released on bail. In case of felony, bail is discretionary, and the matters which ought to be taken into consideration include the nature of the accusation, the nature of the evidence in support of the accusation, and the severity of the punishment which conviction entail. Some crimes are not at all likely to be repeated pending trial and in those cases there may be no objection to bail; but some are, and housebreaking particularly is a crime which will very probably be repeated if a prisoner is released on bail, especially in the case of a man who has a record for housebreaking such as the applicant had. It is an offence which can be committed with a considerable measure of safety to the person committing it".*

31. Remand prisons should not be used as a means to protect the public due to the fear of the accused re-offending. In State v Tak Sang Hao HAM 3/2001s Justice Fatiaki observed:

*“Needless to say the laying of criminal charges ought not to be allowed to become any easy means of depriving or prejudicing a person’s liberty.*

32. The notion of ‘interest of justice’ requires the court to balance the rights of the Accused with interests of the community in determine bail to an accused person. In considering whether or not to admit the accused to bail, careful balance should be struck between the two principles, and this boils down to the interest of the accused versus the public interest. Whilst the accused is entitled to his liberty which flows from his constitutional presumption of innocence, it is in the public interest that offenders are brought to court and tried for their offences. The basic purpose from society's point of view of the procedure known as bail is to strike a balance between two competing interests - the liberty of the accused, and the requirement of the State that he stand trial to be judged and that the administration of justice be safeguarded from interference or frustration.
33. In this respect, steps should be taken to ensure that the accused is available for trial when he is so required and also to obviate the probability of the accused reoffending, interfering with prosecution witnesses or destroying evidence. This may justify the pre-trial incarceration of the accused despite his constitutional presumption of innocence.
34. A judicial officer determining bail must be satisfied that the deprivation of personal liberty is the only option available and resorting to that option is not disproportionate to the objective to be achieved thereby. If the concerns of

public interests and protection of the community can be addressed by imposing stringent bail conditions, courts must not resort to curtail personal liberty, since the primary consideration in determining bail is the likelihood of the accused person surrendering to custody and appearing in court to face his or her trial.

35. The charge against the Appellant is not serious. He is charged with a simple Theft of Yaqona plants. The tariff for simple Theft is 2 to 9 months' imprisonment *Ratusili v State* [2012] FJHC 1249; HAA 011.2012 (1 August 2012). The Appellant has been in remand for approximately six months now. The learned Magistrate has fixed the matter for trial on the 20<sup>th</sup> September, 2017. The Appellant would roughly serve more than his potential sentence without a conviction in remand custody by the time his matter is heard. Therefore, a greave prejudice will be caused to the Appellant if bail is not granted.
36. Appellant has been in remand custody for approximately six months. The learned Magistrate at paragraph 13 of his Ruling referred to substance of section 13 (4) of the Bail Act to justify the continued detention of the Appellant.
37. Although courts are possessed of a discretion to order a detention of an accused person in remand for a period up to two years, that discretion must be exercised judiciously for a valid reason or reasons that would justify such a detention, having regard to other provisions of the Bail Act and the provisions of the Constitution.
38. Section 14 (2) (g) of the Constitution states: *every person charged with an offence has the right to have the case determined within a reasonable time*. When deciding whether to grant bail to an accused person, Courts must take into account the

time the accused may have to spend in custody before trial if bail is not granted [ Section 17 (1) of the Bail Act].

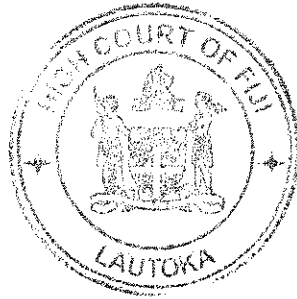
39. Courts are bound to uphold the Constitution and the provisions of the Bail Act when called upon to determine bail. When a court decides, for whatever reason, to refuse bail to an accused person it must expeditiously deal with the matter and ensure a speedy trial. If the court is overburdened with backlogs, the case flow of the court must be managed to give priority to those cases where accused are in remand.
40. According to the report presented by the Assistant Commissioner of Corrections to the Fiji Parliamentary Standing Committee on Economic Justice, Law and Human Rights, the Fiji Correction Service pays \$ 55 a day to maintain an inmate. A cost analysis of this expenditure arrives at a sum of \$ 20,075.00 per year of public money expended for an inmate. Natabua Remand Centre is highly overcrowded. Courts should be mindful of these aspects also when considering public interest and interests of accused.
41. The learned Magistrate at paragraph 13 stated:


*I have also considered accused personal and family circumstances. Though deserving, I do not think they are exceptional for accused to be released on bail.*

42. In determining bail pending trial, a magistrate is not required to be satisfied as to the existence of exceptional circumstances. It appears that the learned Magistrate has set out a high threshold in paragraph 13.

Order

43. For the reasons given, Ruling of the learned Magistrate is reversed and set aside.
44. Appellant is granted bail on following bail conditions.
- [1]. Personal bail of \$ 500.00.
  - [2]. Surety bail of \$500.00 with one surety.



  
Aruna Aluthge  
Judge

At Lautoka

26<sup>th</sup> April 2017

Solicitors: Legal Aid Commission for Appellant  
Office of the Director of Public Prosecution for Respondent